grounds to withhold."[114]

Obviously, if no waiver of Exemption 7(D) results from authorized release of relevant information, "[t]he per se limitation on disclosure under 7(D) does not disappear if the identity of the confidential source becomes known through other means."[115] It should be observed that in the unusual situation in which an agency elects to publicly disclose source-identifying or source-provided information as necessary in furtherance of an important agency function, it "has no duty to seek the witness's permission to waive his confidential status under the Act."[116] Conversely, because Exemption 7(D) "mainly seeks to protect law enforcement agencies in their efforts to find future sources,"[117] "`waiver' by `sources' will not automatically prove sufficient to release the [source-provided] information."[118]

Under the case law, Exemption 7(D)'s protection for sources and the information they have provided is in no way diminished by the fact that an investigation has been closed.[119] Indeed, because of the vital role that Exemp

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[114] Dow Jones, 917 F.2d at 577.

[115] L&C Marine Transp., 740 F.2d at 925 (citing Radowich, 658 F.2d at 960); see, e.g., Lesar, 636 F.2d at 491 (finding that no waiver of confidentiality occurs when confidential information finds its way into public domain); Keeney, 630 F.2d at 119 n.2 (declaring that Exemption 7(D) continues to protect confidential sources even after their identification).

[116] Borton, 566 F. Supp. at 1422; see, e.g., Doe, 790 F. Supp. at 21-22 (clarifying that "the FBI is not required to try to persuade people to change their minds"; any such requirement "would undermine the Bureau's effectiveness").

[117] Irons, 880 F.2d at 1453; see, e.g., Koch v. United States Postal Serv., No. 92-0233, slip op. at 12 (W.D. Mo. Dec. 17, 1992) (stating that individuals would be less likely to come forward with information in future investigations if informant's identity were disclosed), aff'd, 7 F.3d 1042 (8th Cir. 1993) (unpublished table decision).

[118] Irons, 880 F.2d at 1452; Guerrero, No. 93-2006, slip op. at 10 (D. Ariz. Feb. 21, 1996) (holding that "full disclosure of information provided by confidential informant . . . not required simply because" informant made "public statements"); Spurlock v. FBI, No. 91-5602, slip op. at 2 (C.D. Cal. Nov. 29, 1993) (asserting that "fact that [source] had any sense of braggadocio in his telling the world he had talked to the FBI cannot vitiate the protections of the exemption and the nature of his statements to the FBI as confidential"), rev'd on other grounds, 69 F.3d 1010 (9th Cir. 1995). But see Providence Journal, 981 F.2d at 567 n.16 (holding that express waiver of confidentiality by source vitiates Exemption 7(D) protection).

[119] See Ortiz, 70 F.3d at 733 (ruling that "the status of the investigation is . . . immaterial to the application of the exemption"); KTVY-TV, 919 F.2d at 1470-71; Akron Standard Div. of Eagle-Picher Indus. v. Donovan, 780 F.2d 568, 573 (6th Cir. 1986); Foster, 933 F. Supp. at 693 (observing that Exemption

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tion 7(D) plays in promoting effective law enforcement, courts have regularly recognized that its protections cannot be lost through the mere passage of time.[120] Additionally, unlike with Exemption 7(C), the safeguards of Exemption 7(D) remain wholly undiminished by the death of the source.[121]

Perhaps because Exemption 7(D) has been traditionally afforded such a broad construction by the courts, few opinions since the passage of the FOIA Reform Act have hinged on its specific revisions. It is evident, however, that the Act's relaxation of Exemption 7(D)'s harm standard, in conjunction with the other legislative amendments to it, strives to ensure that the utmost protections possible

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[119](...continued)
7(D) "may be claimed even when an investigation generating records containing information concerning a confidential source has been closed"); Almy, 1995 WL 476255, at *13 (stating that Exemption 7(D)'s protection "not diminished" by fact that investigation has been closed); Church of Scientology, 816 F. Supp. at 1161 (holding that source identity and information provided "remains confidential . . . after the investigation is concluded"); Soto, No. 90-1816, slip op. at 7 (D.D.C. Apr. 13, 1992) (ruling that "[i]t is of no consequence that these sources provided information relating to a criminal investigation which has since been completed"); Gale, 141 F.R.D. at 98 (protecting statements made even "while no investigation is pending" under Exemption 7(D)).

[120] See, e.g., Schmerler, 900 F.2d at 336 (indicating that Exemption 7(D) "contains no sunset provision"); Keys, 830 F.2d at 346 (stating that "`Congress has not established a time limitation for exemption (7)(D) and it would be both impractical and inappropriate for the Court to do so.'" (quoting Keys v. Department of Justice, No. 85-2588, slip op. at 9 (D.D.C. May 12, 1986))); King, 830 F.2d at 212-13, 236 (protecting interviews conducted in 1941 and 1952); Irons, 811 F.2d at 689 (applying Exemption 7(D) protection to information regarding 1948-1956 Smith Act trials); Brant Constr., 778 F.2d at 1265 n.8 (enunciating that "policy of 7(D) [is] to protect future sources of information[;]" passage of time "does not alter status" of source-provided information); Diamond, 707 F.2d at 76-77 (protecting McCarthy-era documents); Reiter, 1997 WL 470108, at *7 (reiterating that Exemption 7(D) source remains confidential "indefinitely"); Fitzgibbon, 747 F. Supp. at 60 (protecting information regarding alleged 1961 plot against President Kennedy by Trujillo regime in Dominican Republic); Abrams v. FBI, 511 F. Supp. 758, 762-63 (N.D. Ill. 1981) (protecting 27-year-old documents).

[121] See, e.g., McDonnell, 4 F.3d at 1258 (whether source is "deceased does not extend to the information withheld pursuant to Exemption 7(D)"); Schmerler, 900 F.2d at 336 ("that the sources may have died is of no moment to the analysis"); Kiraly, 728 F.2d at 279 (protection of information provided by deceased source who also testified at trial); Cohen v. Smith, No. 81-5365, slip op. at 4 (9th Cir. Mar. 25, 1983); see also FOIA Update, Summer 1983, at 5; cf. Allen v. DOD, 658 F. Supp. 15, 20 (D.D.C. 1986) (protection of deceased intelligence sources under Exemption 1). But see Dayton Newspapers, No. 3-85-815, slip op. at 3-4 (S.D. Ohio Feb. 9, 1993) (ruling that FBI should release name of deceased law enforcement officer because it is not "inherently private information about a person").

will continue to be afforded to confidential sources.[122] All federal agencies maintaining law enforcement information should apply the strengthened Exemption 7(D) where necessary to provide adequate source protection,[123] but at the same time apply the "foreseeable harm" standard and make discretionary disclosures of information falling within the exemption's broad coverage whenever it is possible to do so without harm to the confidential source involved.[124]

EXEMPTION 7(E)

Exemption 7(E) affords protection to all law enforcement information which "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."[1] This exemption contains two distinct protective clauses.

The first clause of Exemption 7(E) permits the withholding of "records or information compiled for law enforcement purposes . . . [which] would disclose techniques and procedures for law enforcement investigations or prosecutions."[2] This clause is phrased in such a way that it does not require a showing of any particular determination of harm--or risk of circumvention of law--that would be caused by disclosure of the records or information within its coverage.[3] Rather, it

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[122] See Attorney General's 1986 Amendments Memorandum at 13.

[123] Sluby v. United States Dep't of Justice, No. 86-1503, 1987 WL 10509, at *2-3 (D.D.C. Apr. 30, 1987) ("`robust' reading of [E]xemption 7(D) is supported by . . . Congressional events"); Randle v. Commissioner, 866 F. Supp. 1080, 1085 (N.D. Ill. 1994) (although most exemptions construed narrowly, confidential source exemption applied "`robustly'"); accord Irons, 811 F.2d at 687-89 (post-amendment decision extending Exemption 7(D) protection to sources who received only conditional assurances of confidentiality).

[124] See FOIA Update, Spring 1994, at 3; FOIA Update, Summer/Fall 1993, at 10; see also FOIA Update, Fall 1994, at 7 (citing examples of discretionary disclosure of Exemption 7(D) information upon application of "foreseeable harm" standard); accord Attorney General Reno's FOIA Memorandum, reprinted in FOIA Update, Summer/Fall 1993, at 4-5; FOIA Update, Spring 1997, at 1.

[1] 5 U.S.C. § 552(b)(7)(E) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

[2] Id.

[3] See Coleman v. FBI, No. 89-2773, slip op. at 25 (D.D.C. Dec. 10, 1991), summary affirmance granted, No. 92-5040 (D.C. Cir. Dec. 4, 1992).

is designed to provide "categorical" protection of the information so described.[4]

Notwithstanding the broad scope of Exemption 7(E)'s protection, in order for the exemption to apply the technique or procedure at issue must not be already well known to the public.[5] Accordingly, techniques such as "mail covers" and the "use of post office boxes,"[6] "`security flashes' or the tagging of fingerprints,"[7] pretext telephone calls,[8] and "documentation appropriate for seeking search warrants before launching raiding parties" that was included in court records[9] have been denied protection under Exemption 7(E) when courts have found them to be generally known to the public.

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[4] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 16 n.27 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum]; see, e.g., American Civil Liberties Union Found. v. United States Dep't of Justice, 833 F. Supp. 399, 407 (S.D.N.Y. 1993) (The first clause of Exemption 7(E) does not "necessarily require an individualized showing for each document."); Fisher v. United States Dep't of Justice, 772 F. Supp. 7, 12 n.9 (D.D.C. 1991), aff'd, 968 F.2d 92 (1992) (unpublished table decision); see also FOIA Update, Spring 1994, at 3 (distinguishing between Exemption 7(E)'s two clauses).

[5] See Attorney General's 1986 Amendments Memorandum at 16 n.27 (citing S. Rep. No. 98-221, at 25 (1983) (citing, in turn, H.R. Rep. No. 93-180, at 12 (1974), reprinted in 1974 U.S.C.C.A.N. 6267)); see also Campbell v. United States Dep't of Justice, No. 89-cv-3016, slip op. at 6 (D.D.C. Aug. 6, 1997) (declaring that Exemption 7(E) applies to "obscure or secret techniques"); Albuquerque Publ'g Co. v. United States Dep't of Justice, 726 F. Supp. 851, 858 (D. Ariz. 1989) (agencies "should avoid burdening the Court with techniques commonly described in movies, popular novels, stories or magazines or television"); cf. Don Ray Drive-A-Way Co. v. Skinner, 785 F. Supp. 198, 200 (D.D.C. 1992) (computer algorithm used by Department of Transportation to determine safety rating of motor carriers "does not simply involve investigative techniques or procedures" because it has same status as regulations or agency law).

[6] Dunaway v. Webster, 519 F. Supp. 1059, 1082-83 (N.D. Cal. 1981).

[7] Ferguson v. Kelley, 448 F. Supp. 919, 926 (N.D. Ill. 1977), reconsideration granted & denied in part, 455 F. Supp. 324 (N.D. Ill. 1978).

[8] See Rosenfeld v. United States Dep't of Justice, 57 F.3d 803, 815 (9th Cir. 1995), petition for cert. dismissed, 116 S. Ct. 833 (1996); see also Struth v. FBI, 673 F. Supp. 949, 970 (E.D. Wis. 1987) (dismissing pretext as merely "garden variety ruse or misrepresentation"). But see Nolan v. United States Dep't of Justice, No. 89-A-2035, 1991 WL 36547, at *8 (D. Colo. Mar. 18, 1991) (concluding that disclosure of information surrounding pretext phone call may harm ongoing investigations), aff'd on other grounds, 973 F.2d 843 (10th Cir. 1992).

[9] National Org. for the Reform of Marihuana Laws v. DEA, No. 80-1339, slip op. at 8 (D.D.C. June 24, 1981).

In some cases, however, commonly known procedures have been protected from disclosure when "`the circumstances of their usefulness . . . may not be widely known,'"[10] or "their use in concert with other elements of an investigation and in their totality directed toward a specific investigative goal constitute a `technique' which merits protection."[11] Increasingly, moreover, despite the

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[10] Wickline v. FBI, No. 92-1189, 1994 WL 549756, at *5 (D.D.C. Sept. 30, 1994) (quoting Parker v. United States Dep't of Justice, No. 88-0760, slip op. at 8 (D.D.C. Feb. 28, 1990), aff'd in pertinent part, No. 90-5070 (D.C. Cir. June 28, 1990)); see, e.g., Delviscovo v. FBI, 903 F. Supp. 1, 3 (D.D.C. 1995) (declaring withholding of FBI accomplishment report (containing information on use and effectiveness of investigative techniques) to be "well established" and "proper"), summary affirmance granted, No. 95-5388 (D.C. Cir. Jan. 24, 1997); Buffalo Evening News, Inc. v. United States Border Patrol, 791 F. Supp. 386, 392 n.5, 393 n.6 (W.D.N.Y. 1992) (accepting that Exemption 7(E) correctly protects fact of whether alien's name is listed in INS Lookout Book); Wagner v. FBI, No. 90-1314, slip op. at 5 (D.D.C. June 4, 1991) (finding that exemption protects detailed surveillance and undercover investigative methods and techniques), summary affirmance granted, No. 91-5220 (D.C. Cir. Aug. 3, 1992); McCoy v. Moschella, No. 89-2155, slip op. at 9-10 (D.D.C. Sept. 30, 1991) (approving invocation of Exemption 7(E) for categorization of similar bank robberies for purposes of subject identification); see also Biase v. Office of Thrift Supervision, No. 93-2521, slip op. at 12 (D.N.J. Dec. 16, 1993) ("investigative techniques and procedures that are either not commonly known to the public, or if publicly known, their disclosure could lessen their effectiveness"); cf. Davin v. United States Dep't of Justice, 60 F.3d 1043, 1064 (3d Cir. 1995) (remanding for further evidence to support nondisclosure of techniques used in recruiting informants during 1930's). But see Campbell, No. 89-cv-3016, slip op. at 7 (D.D.C. Aug. 6, 1997) (refusing to approve nondisclosure of particular circumstances surrounding use of "basic" techniques).

[11] PHE, Inc. v. United States Dep't of Justice, No. 90-1461, slip op. at 7 (D.D.C. Jan. 31, 1991), aff'd in pertinent part, rev'd in part & remanded, 983 F.2d 248 (D.C. Cir. 1993); see, e.g., Hassan v. FBI, No. 91-2189, slip op. at 8-10 (D.D.C. July 13, 1992) (protecting common techniques used with uncommon technique to achieve unique investigative goal), summary affirmance granted, No. 92-5318 (D.C. Cir. Mar. 17, 1993); Varelli v. FBI, No. 88-1865, slip op. at 17 (D.D.C. Oct. 4, 1991) (same); Beck v. United States Dep't of the Treasury, No. 88-493, slip op. at 26 (D.D.C. Nov. 8, 1989) (approving nondisclosure of certain documents, including map, because disclosure would reveal surveillance technique used by Customs Service, as well as why certain individuals were contacted with regard to investigations), aff'd, 946 F.2d 1563 (D.C. Cir. 1992) (unpublished table decision). But see Campbell v. United States Dep't of Justice, No. 89-cv-3016, 1996 WL 554511, at *10 (D.D.C. Sept. 19, 1996) (requiring in camera review to determine if circumstances surrounding particular type of pretext telephone call, coupled with basic procedure itself, form unique investigative technique warranting protection), subsequent decision, No. 89-cv-3016, slip op. at 7 (D.D.C. Aug. 6, 1997) (finding, after in camera review,

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categorical nature of protection under the first clause of Exemption 7(E), courts have justified withholding a wide variety of commonly known procedures on the basis that their disclosure could reduce or nullify their effectiveness.[12]

Recent case law generally continues a trend apparent in older cases[13] of

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rationale for protection of some techniques "inadequate").

[12] See, e.g., Hale v. United States Dep't of Justice, 973 F.2d 894, 902-03 (10th Cir. 1992) (concluding that disclosure of use of security devices and their modus operandi and polygraph matters could lessen their effectiveness), cert. granted, vacated & remanded on other grounds, 509 U.S. 918 (1993); Bowen v. FDA, 925 F.2d 1225, 1228 (9th Cir. 1991) (deciding that release of specifics of cyanide-tracing techniques would present serious threat to future product-tampering investigations); Steinberg v. United States Dep't of Justice, No. 93-2409, slip op. at 15-16 (D.D.C. July 14, 1997) (approving nondisclosure of precise details of telephone and travel surveillance despite fact that criminals know such techniques are used); Code v. FBI, No. 95-1892, 1997 WL 150070, at *8 (D.D.C. Mar. 26, 1997) (recognizing that disclosure of criminal personality profiles could assist criminals in evading detection); Butler v. Department of the Treasury, No. 95-1931, 1997 U.S. Dist. LEXIS 802, at *11 (D.D.C. Jan. 14, 1997) (deciding that disclosing methods of monitoring or type of equipment used could enable future targets to avoid surveillance); Pray v. Department of Justice, 902 F. Supp. 1, 4 (D.D.C. 1995) (concluding that release of information about particular investigative techniques and their effectiveness in FBI accomplishment report could enable criminals to employ countermeasures to neutralize their effectiveness), summary affirmance granted in pertinent part, 1996 WL 734142 (D.C. Cir. Nov. 20, 1996); Perrone v. FBI, 908 F. Supp. 24, 28 (D.D.C. 1994) (finding that release of precise polygraph questions and their sequence would allow circumvention of test); Coleman v. FBI, No. 89-2773, slip op. at 26 (D.D.C. Dec. 10, 1991) (while techniques themselves may be known, disclosure of specific use or patterns of use reduces future effectiveness), summary affirmance granted, No. 92-5040 (D.C. Cir. Dec. 4, 1992); Fisher v. United States Dep't of Justice, 772 F. Supp. at 12 (stating that disclosure of information within context of documents at issue could alert subjects of investigation about techniques used to aid FBI); see also FOIA Update, Spring 1984, at 5; cf. United States v. Van Horn, 789 F.2d 1492, 1508 (11th Cir. 1986) ("Disclosing the precise locations where surveillance devices are hidden or their precise specifications will educate criminals regarding how to protect themselves against police surveillance.") (recognizing qualified privilege in criminal case). But see Linn v. United States Dep't of Justice, No. 92-1406, 1995 WL 417810, at *26 (D.D.C. June 5, 1995) (rejecting invocation of Exemption 7(E) because no justification provided to show how release of commonly known technique could interfere with future law enforcement efforts).

[13] See, e.g., Cohen v. Smith, No. 81-5365, slip op. at 8 (9th Cir. Mar. 25, 1983) (protecting details of telephone interviews); U.S. News & World Report v. Department of the Treasury, No. 84-2303, slip op. at 7 (D.D.C. Mar. 26, 1986) (protecting Secret Service's contract specifications for President's armored limousine); Fund for a Conservative Majority v. Federal Election Comm'n, No. 84-

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allowing agencies to describe the general nature of the technique while withholding the full details.[14] Often, however, it is not possible to describe secret law enforcement techniques, even in general terms, without disclosing the very information sought to be withheld.[15] A court's in camera review of the documents

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[13](...continued)
1342, slip op. at 6-8 (D.D.C. Feb. 26, 1985) (alternative holding) (finding audit criteria properly withheld); LeClair v. United States Secret Serv., No. 82-2162, slip op. at 5 (D. Mass. Feb. 23, 1983) (upholding nondisclosure for "Administrative Profile" used to evaluate individuals in connection with protective services); Windels, Marx, Davies & Ives v. Department of Commerce, 576 F. Supp. 405, 413-14 (D.D.C. 1983) (alternative holding) (computer program used to detect anti-dumping law violations); Hayward v. United States Dep't of Justice, 2 Gov't Disclosure Serv. (P-H) ¶ 81,231, at 81,646 (D.D.C. July 14, 1981) (protecting methods and techniques used by U.S. Marshals Service to relocate protected witnesses); Malloy v. United States Dep't of Justice, 457 F. Supp. 543, 545 (D.D.C. 1978) (protecting details concerning "bait money" and "bank security devices"); Ott v. Levi, 419 F. Supp. 750, 752 (E.D. Mo. 1976) (protecting laboratory techniques used in arson investigation).

[14] See, e.g., Bowen, 925 F.2d at 1228 (ruling that release of specifics of cyanide-tracing techniques would present serious threat to future product-tampering investigations); Becker v. IRS, No. 91-C-1203, slip op. at 14-15 (N.D. Ill. Mar. 27, 1992) (techniques used by IRS to identify and investigate tax protestors), aff'd, 34 F.3d 398 (7th Cir. 1994); Destileria Serralles, Inc. v. Department of the Treasury, No. 85-837, slip op. at 15 (D.P.R. Sept. 22, 1988) (finding properly withheld technique for examining records of alcoholic beverage retailers "to determine whether discounts offered by a wholesale liquor dealer were used as a subterfuge for the giving of a thing of value to the retailer"); O'Connor v. IRS, 698 F. Supp. 204, 206-07 (D. Nev. 1988) (approving nondisclosure of "tolerance and criteria used internally by the IRS in investigations"); Laroque v. United States Dep't of Justice, No. 86-2677, 1988 WL 75942, at *3 (D.D.C. July 12, 1988) (protecting "reason codes" and "source codes" in State Department "lookout notices"); Luther v. IRS, No. 5-86-130, slip op. at 3-4 (D. Minn. June 8, 1987) (magistrate's recommendation) (alternative holding) (protecting "IRS's Discriminant Function Scores" used to select returns for auditing), adopted (D. Minn. Aug. 13, 1987).

[15] See, e.g., Butler, 1997 U.S. Dist. LEXIS, at *11 (observing that "[i]t is sometimes impossible" to describe secret law enforcement techniques without disclosing information sought to be withheld); Anderson v. DEA, No. 92-225, slip op. at 12 (W.D. Pa. May 18, 1994) (magistrate's recommendation) (specifying on record which technique was used would undermine its future utility), adopted (W.D. Pa. June 27, 1994), appeal dismissed for failure to prosecute, No. 94-3387 (3d Cir. Sept. 12, 1994); Soto v. DEA, No. 90-1816, slip op. at 7 (D.D.C. Apr. 13, 1992) (concluding that detailed description of technique pertaining to detection of drug traffickers would effectively disclose it).

at issue may be required to substantiate such nondisclosure claims.[16]

Prior to the Freedom of Information Reform Act of 1986,[17] Exemption 7(E) protected law enforcement techniques and procedures only when they could be regarded as "investigatory" or "investigative" in character,[18] but this limitation was removed by the 1986 amendments. Exemption 7(E), as amended, simply covers "techniques and procedures for law enforcement investigations or prosecutions."[19] As such, it authorizes the withholding of information consisting of, or reflecting, a law enforcement "technique" or a law enforcement "procedure," wherever it is used "for law enforcement investigations or prosecutions" generally.[20] Law enforcement manuals, including those that pertain to the "prosecutions" stage of the law enforcement process, accordingly meet the requirements for withholding under Exemption 7(E) to the extent that they consist of, or reflect, law enforcement techniques and procedures that are confidential.[21]

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[16] See, e.g., Jones v. FBI, 41 F.3d 238, 249 (6th Cir. 1994); Campbell, 1996 WL 554511, at *10; Linn, 1995 WL 417810, at *12; Rojem v. United States Dep't of Justice, 775 F. Supp. 6, 12 (D.D.C. 1991), upholding Exemption 7(E) upon in camera inspection, No. 90-3021 (D.D.C. Oct. 31, 1991), appeal dismissed for failure to timely file, No. 92-5088 (D.C. Cir. Nov. 4, 1992).

[17] Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48, 3207-49.

[18] Pub. L. No. 93-502, 88 Stat. 1561, 1563 (1974).

[19] 5 U.S.C. § 552(b)(7)(E).

[20] Id.; see Attorney General's 1986 Amendments Memorandum at 15; see also Guerrero v. DEA, No. 93-2006, slip op. at 14-15 (D. Ariz. Feb. 22, 1996) (holding that Exemption 7(E) properly protects portions of DEA Agents Manual concerning undercover operations, confidential informant codes, surveillance devices, and enforcement and security procedures); Hammes v. United States Customs Serv., No. 94 Civ. 4868, 1994 WL 693717, at *1 (S.D.N.Y. Dec. 9, 1994) (protecting Customs Service criteria used to determine which passengers to stop and examine). But see Cowsen-El v. United States Dep't of Justice, 826 F. Supp. 532, 533-34 (D.D.C. 1992) (finding Bureau of Prisons program statement to be internal policy document wholly unrelated to investigations or prosecutions).

[21] Attorney General's 1986 Amendments Memorandum at 16; see, e.g., Guerrero v. DEA, slip op. at 14-15 (approving nondisclosure of portions of DEA Agents Manual); Church of Scientology Int'l v. IRS, 845 F. Supp. 714, 723 (C.D. Cal. 1993) (concluding that parts of IRS Law Enforcement Manual concerning "procedures for handling applications for tax exemption and examinations of Scientology entities" and memorandum regarding application of such procedures properly withheld); Williston Basin Interstate Pipeline Co. v. Federal Energy Regulatory Comm'n, No. 88-592, 1989 WL 44655, at *2 (D.D.C. Apr. 17, 1989) (finding portions of regulatory audit describing significance of each page in audit report, investigatory technique utilized, and auditor's conclusions to constitute "the functional equivalent of a manual of investigative techniques").

EXEMPTION 7(E)

Agencies should be mindful, however, that Exemption 7(E) is characteristically an exemption that protects, in the words of Attorney General Reno's FOIA Memorandum of October 4, 1993, "only a governmental interest."[22] As Attorney General Reno's FOIA Memorandum points out, such information is particularly well suited for discretionary disclosure when such disclosure can be made without "foreseeable harm."[23] The very broad, nonharm-based nature of Exemption 7(E)'s first clause leaves much room for discretionary disclosure upon application of the "foreseeable harm" standard.[24] (See also discussion of Discretionary Disclosure and Waiver, below.)

Exemption 7(E)'s second clause separately protects "guidelines for law enforcement investigations or prosecutions if [their] disclosure could reasonably be expected to risk circumvention of the law."[25] As such, it has a distinct harm standard built into it--not unlike the "anti-circumvention," "high 2" aspect of Exemption 2.[26] (See discussion of Exemption 2, "High 2": Risk of Circumvention, above.) This distinct protection is intended to ensure proper protection for the type of law enforcement guideline information found ineligible to be withheld in the en banc decision of the Court of Appeals for the District of Columbia Circuit in Jordan v. Department of Justice,[27] a case involving guidelines for prosecutions. It reflects a dual concern with the need to remove any lingering effect of that decision, while at the same time ensuring that agencies do not unnecessarily maintain "secret law" on the standards used to regulate behavior.[28]

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[22] Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (Oct. 4, 1993) [hereinafter Attorney General Reno's FOIA Memorandum], reprinted in FOIA Update, Summer/Fall 1993, at 4.

[23] Id. (establishing "foreseeable harm" standard governing use of FOIA exemptions); see also FOIA Update, Spring 1997, at 1 (describing Attorney General's reiteration of importance of "foreseeable harm" standard to federal agencies in order to promote further discretionary disclosure in agency decision-making).

[24] See FOIA Update, Spring 1994, at 3 (distinguishing between two clauses of Exemption 7(E)).

[25] 5 U.S.C. § 552(b)(7)(E).

[26] See Berg v. Commodity Futures Trading Comm'n, No. 93 C 6741, slip op. at 11 n.2 (N.D. Ill. June 23, 1994) (magistrate's recommendation) ("[I]t would appear that exemption (b)(7)(E) is essentially a codification of the `high 2' exemption."), accepted & dismissed per stipulation (N.D. Ill. July 26, 1994); see also FOIA Update, Spring 1994, at 3.

[27] 591 F.2d 753, 771 (D.C. Cir. 1978) (en banc).

[28] S. Rep. No. 98-221, at 25 (1983); see Attorney General's 1986 Amendments Memorandum at 16-17; see also Don Ray Drive-A-Way, 785 F. Supp. at 200 & n.1 (disclosure of safety ratings system necessary to permit regulated entities to

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Accordingly, this clause of Exemption 7(E) is available to protect any "law enforcement guideline" information of the type involved in Jordan, whether it pertains to the prosecution or basic investigative stage of a law enforcement matter, whenever it is determined that its disclosure "could reasonably be expected to risk circumvention of the law."[29] In choosing this particular harm formulation, Congress employed the more relaxed harm standard now used widely throughout Exemption 7 and obviously "was guided by the `circumvention of the law' standard that the D.C. Circuit established in its en banc decision"[30] in Crooker v. ATF.[31] However, in applying this clause of Exemption 7(E) to law enforcement manuals, agencies should be careful to focus on only the portions of those guidelines that specifically correlate to foreseeable harm to law

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[28](...continued)
know what agency considers most serious safety breaches).

[29] See, e.g., PHE, 983 F.2d at 251 ("release of FBI guidelines as to what sources of information are available to its agents might encourage violators to tamper with those sources of information and thus inhibit investigative efforts"); Voinche v. FBI, 940 F. Supp. 323, 331 (D.D.C. 1996) (upholding nondisclosure of "Criminal Intelligence Digest" used to assist and guide FBI personnel) (alternative holding), aff'd, No. 96-5304 (D.C. Cir. June 19, 1997), petition for cert. filed, 66 U.S.L.W. 3178 (U.S. Sept. 2, 1997) (No. 97-383); Jimenez v. FBI, 938 F. Supp. 21, 27 (D.D.C. 1996) (approving invocation of Exemption 7(E) to protect gang-validation criteria used by Bureau of Prisons to determine whether individual is gang member); Foster v. United States Dep't of Justice, 933 F. Supp. 687, 693 (E.D. Mich. 1996) (holding that release of techniques and guidelines used in undercover operations would diminish their effectiveness); Pully v. IRS, 939 F. Supp. 429, 437 (E.D. Va. 1996) (finding that release of discriminant function scores would enable taxpayers to "flag" IRS computers); Berg, No. 93 C 6742, slip op. at 11-12 (N.D. Ill. June 23, 1994) (concluding that release of guidelines concerning use of consumer complaints and correspondence in investigations could risk circumvention of law); Silber v. United States Dep't of Justice, No. 91-876, transcript at 25 (D.D.C. Aug. 13, 1992) (bench order) (disclosure of monograph on fraud litigation "would present the specter of circumvention of the law"); Small v. IRS, 820 F. Supp. 163, 165-66 (D.N.J. 1992) (disclosure of "IRS's Discriminant Function Scores" would result in circumvention of tax laws; IRS tolerance and audit guidelines withheld because disclosure would allow taxpayers to devise circumvention strategies); Center for Nat'l Sec. Studies v. INS, No. 87-2068, slip op. at 14 (D.D.C. Dec. 19, 1990) (protecting final contingency plan in event of attack on United States, guidelines for response to terrorist attacks, and contingency plans for immigration emergencies). But see Church of Scientology v. IRS, 816 F. Supp. 1138, 1162 (W.D. Tex. 1993) (holding that IRS did not establish how release of records "regarding harassment of Service employees" written during investigation "could reasonably be expected to circumvent the law"), appeal dismissed per stipulation, No. 93-8431 (5th Cir. Oct. 21, 1993).

[30] S. Rep. No. 98-221, at 25 (1983); see Attorney General's 1986 Amendments Memorandum at 17.

[31] 670 F.2d 1051 (D.C. Cir. 1981).

enforcement efforts[32] and to meet their obligations to disclose all reasonably segregable, nonexempt information.[33]

Law enforcement agencies therefore may avail themselves of the distinct protections provided in Exemption 7(E)'s two clauses. Their "noninvestigatory" law enforcement records, to the extent that they can be fairly regarded as reflecting techniques or procedures, are entitled to categorical protection under Exemption 7(E)'s first clause--subject, of course, to administrative application of the "foreseeable harm" standard.[34] In addition, law enforcement guidelines that satisfy the broad "could reasonably be expected to risk circumvention of law" standard can be protected under Exemption 7(E)'s second clause.[35] (See also discussion of Exemption 2's overlapping "anti-circumvention" protection under Exemption 2, "High 2": Risk of Circumvention, above.)

EXEMPTION 7(F)

As a result of the Freedom of Information Reform Act of 1986,[1] Exemption 7(F) permits the withholding of information necessary to protect the physical safety of a wide range of individuals. Whereas Exemption 7(F) previously protected records that "would . . . endanger the life or physical safety of law enforcement personnel,"[2] the amended exemption provides protection to "any individual" when disclosure of information about him "could reasonably be

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[32] See, e.g., PHE, 983 F.2d at 252 (National Obscenity Enforcement Unit failed to submit affidavit containing "precise descriptions of the nature of the redacted material and providing reasons why releasing each withheld section would create a risk of circumvention of the law"); Linn, 1995 WL 417810, at *32 (affirming nondisclosure of one page from "Drug Agent's Guide to Forfeiture of Assets"; agency specified material withheld and explained disclosure harm); see also Attorney General Reno's FOIA Memorandum, reprinted in FOIA Update, Summer/Fall 1993, at 4-5; FOIA Update, Spring 1994, at 3.

[33] See PHE, 983 F.2d at 252 (agency must "clearly indicate why disclosable material could not be segregated from exempted material"); see, e.g., Wightman v. ATF, 755 F.2d 979, 982-83 (1st Cir. 1985) (remanding for determination of segregability) (Exemption 2); Schreibman v. United States Dep't of Commerce, 785 F. Supp. 164, 166 (D.D.C. 1991) (remanding for segregability finding regarding computer system vulnerability assessment) (Exemption 2); see also FOIA Update, Summer/Fall 1993, at 11-12 ("OIP Guidance: The `Reasonable Segregation' Obligation").

[34] See Attorney General Reno's FOIA Memorandum, reprinted in FOIA Update, Summer/Fall 1993, at 4-5; FOIA Update, Spring 1994, at 3.

[35] See Attorney General's 1986 Amendments Memorandum at 17 & n.31.

[1] Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 to 3207-49.

[2] Pub. L. No. 93-502, 88 Stat. 1561, 1563 (1974) (subsequently amended).

expected to endanger [his] life or physical safety."[3]

Prior to the 1986 FOIA amendments, this exemption had been invoked to protect both federal and local law enforcement officers.[4] Cases decided after the 1986 FOIA amendments continue this strong protection for law enforcement agents.[5] Under the amended language of Exemption 7(F), courts have applied the

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[3] 5 U.S.C. § 552(b)(7)(F) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

[4] See, e.g., Maroscia v. Levi, 569 F.2d 1000, 1002 (7th Cir. 1977) (FBI special agents and "other law enforcement personnel"); Barham v. Secret Serv., No. 82-2130, slip op. at 5 (W.D. Tenn. Sept. 13, 1982) (Secret Service agents); Docal v. Bennsinger, 543 F. Supp. 38, 48 (M.D. Pa. 1981) (DEA special agents, supervisory special agents, and local law enforcement officers); Nunez v. DEA, 497 F. Supp. 209, 212 (S.D.N.Y. 1980) (DEA special agents); Ray v. Turner, 468 F. Supp. 730, 735 (D.D.C. 1979) (U.S. Customs Service agent).

[5] See, e.g., Jimenez v. FBI, 938 F. Supp. 21, 30-31 (D.D.C. 1996) (holding that disclosure of names of DEA special agents, supervisors, and local law enforcement officer could result in "physical attacks, threats, or harassment"; disclosure of DEA's investigative personnel would endanger lives of its agents and have "detrimental effect" on its operations); Kitchen v. DEA, No. 93-2035, slip op. at 16 (D.D.C. Oct. 11, 1995) (protecting identities of DEA special agents, supervisory special agents, and local law enforcement officers), appeal dismissed for failure to prosecute, No. 95-5380 (D.C. Cir. Dec. 11, 1996); Badalamenti v. United States Dep't of State, 899 F. Supp. 542, 550 (D. Kan. 1995) (protecting names of law enforcement personnel); Linn v. United States Dep't of Justice, No. 92-1406, slip op. at 26 (D.D.C. June 6, 1995) (identities of DEA special agents and other law enforcement officers); Augarten v. DEA, No. 93-2192, 1995 WL 350797, at *3 (D.D.C. May 22, 1995) ("law enforcement officers and DEA agents who are particularly likely to be in contact with violent suspects"); Almy v. Department of Justice, No. 90-362, slip op. at 26 (N.D. Ind. Apr. 13, 1995) (names of DEA agents, supervisory agents, and other law enforcement personnel), aff'd, 114 F.3d 1191 (7th Cir. 1997) (unpublished table decision); McFarland v. DEA, No. 94-S-620, slip op. at 6 (D. Colo. Jan. 3, 1995) (identities of DEA special agents); Anderson v. DEA, No. 92-0225, slip op. at 14 (W.D. Pa. May 18, 1994) (magistrate's recommendation) (release of agents' names could endanger them), adopted (W.D. Pa. June 27, 1994), appeal dismissed for failure to prosecute, No. 94-3387 (3d Cir. Sept. 12, 1994); Butler v. United States Dep't of Justice, No. 86-2255, slip op. at 15 (D.D.C. Feb. 3, 1994) (names of DEA agents who worked undercover drug-conspiracy investigation), appeal voluntarily dismissed, No. 94-5078
(D.C. Cir. Sept. 8, 1994); Manchester v. DEA, 823 F. Supp. 1259, 1273 (E.D. Pa. 1993) (names and identities of DEA special agents, supervisory special agents, and other law enforcement officers); Epps v. United States Dep't of Justice, 801 F. Supp. 787, 795 (D.D.C. 1992) (same), summary affirmance granted in pertinent part, No. 92-5360 (D.C. Cir. Apr. 29, 1993); Beck v. United States Dep't of Justice, No. 88-3433, slip op. at 2-3 (D.D.C. July 24, 1991) (names mentioned

(continued...)

broader coverage now offered by the exemption, holding that it can afford protection of the "names and identifying information of . . . federal employees, and third persons who may be unknown" to the requester in connection with particular law enforcement matters.[6] Withholding of such information can be

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[5](...continued)
in criminal investigative files), summary affirmance granted in pertinent part, vacated & remanded in part, No. 91-5292 (D.C. Cir. Nov. 19, 1992); see also Housley v. DEA, No. 92-16946, slip op. at 3 (9th Cir. May 4, 1994) (Exemption 7(F) properly used to protect "physical safety").

[6] Luther v. IRS, No. 5-86-130, slip op. at 6 (D. Minn. Aug. 13, 1987); see also Isley v. Executive Office for United States Attorneys, No. 96-0123, slip op. at 8-9 (D.D.C. Mar. 27, 1997) (upholding agency's nondisclosure of identifying information about individuals who provided information during murder investigation; reasonable likelihood that disclosure would threaten their lives), appeal dismissed, No. 97-5105 (D.C. Cir. Sept. 8, 1997); Anderson v. United States Marshals Serv., 943 F. Supp. 37, 40 (D.D.C. 1996) (protecting identity of individual who required separation from requester; disclosure could endanger his safety); Jimenez, 938 F. Supp. at 30-31 (protecting names and identifying information furnished by confidential sources, as well as names of law enforcement personnel); Foster v. United States Dep't of Justice, 933 F. Supp. 687, 693 (E.D. Mich. 1996) (protecting confidential informants; because of nature of investigation concerning plaintiff, informants' lives or safety would be endangered if information disclosed); Bruscino v. Federal Bureau of Prisons, No. 94-1955, slip op. at 24 (D.D.C. May 12, 1995) (protecting investigatory information obtained from sources whose lives would be endangered by disclosure, especially in view of "rough justice" to be rendered upon informants should identities be disclosed), summary affirmance granted in pertinent part, vacated & remanded in part, No. 95-5213, 1996 WL 393101 (D.C. Cir. June 24, 1996); Crooker v. IRS, No. 94-0755, slip op. at 11 (D.D.C. Apr. 27, 1995) (confidential informants protected when requester has history of harassing, intimidating, and abusing witnesses); Durham v. United States Dep't of Justice, 829 F. Supp. 428, 434 (D.D.C. 1993) (given requester's past violent behavior, agency can protect identities of individuals who assisted FBI in its case against requester), appeal dismissed for failure to timely file, No. 93-5354 (D.C. Cir. Nov. 29, 1994); Manna v. United States Dep't of Justice, 815 F. Supp. 798, 810 (D.N.J. 1993) (release of FBI reports would endanger life or physical safety of victims, informants, and potential and actual witnesses), aff'd on other grounds, 51 F.3d 1158 (3d Cir.), cert. denied, 116 S. Ct. 477 (1995); Kele v. United States Parole Comm'n, No. 92-1302, slip op. at 3 (D.D.C. Aug. 18, 1992) (agency can withhold adverse witness's address and also statements concerning his involvement with requester and willingness to testify at requester's probation hearing); Sanders v. United States Dep't of Justice, No. 91-2263, slip op. at 10
(D. Kan. Apr. 21, 1992) (in view of requester's mental difficulties, disclosing identities of medical personnel who prepared requester's mental health records would endanger their safety); Author Servs. v. IRS, No. 90-2187, slip op. at 7 (C.D. Cal. Nov. 14, 1991) (identities of third parties and handwriting and identities of IRS employees withholdable in view of previous conflict and hostility be-
(continued...)

necessary to protect such persons from possible harm by a requester who has threatened them in the past.[7] A court also has held that the very expansive language of "any individual" encompasses protection of the identities of informants who have been threatened with harm.[8]

Significantly, Exemption 7(F) protection has been held to remain applicable even after a law enforcement officer subsequently retired.[9] On the other hand, it has been held that Exemption 7(F) could not be employed to protect the identities of individuals who testified at the requester's criminal trial.[10] And one court approved a rather novel, but certainly appropriate, application of this exemption to a description in an FBI laboratory report of a homemade machine gun because its disclosure would create the real possibility that law enforcement officers would have to face "individuals armed with homemade devices constructed from the expertise of other law enforcement people."[11]

Although Exemption 7(F)'s coverage is in large part duplicative of that afforded by Exemption 7(C), it is potentially broader in that no balancing is re-

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[6](...continued)
tween parties). But see Linn v. United States Dep't of Justice, No. 92-1406, slip op. at 19 (D.D.C. Aug. 22, 1995) (agency must first establish that information logically falls within exemption claimed; it "has not established even a minimal nexus" between withheld information and harm to persons discussed in file).

[7] See, e.g., Luther, No. 5-86-130, slip op. at 6 (D. Minn. Aug. 13, 1987); see also Durham, 829 F. Supp. at 434 (protection for third parties who have knowledge about crime in which requester was involved); Manna, 815 F. Supp. at 810 (victims, informants, and potential and actual witnesses in La Cosa Nostra case protected).

[8] Housley v. FBI, No. 87-3231, slip op. at 7 (D.D.C. Mar. 18, 1988) (identities of informants).

[9] See Moody v. DEA, 592 F. Supp. 556, 559 (D.D.C. 1984).

[10] See Linn v. United States Dep't of Justice, No. 92-1406, 1997 U.S. Dist. LEXIS 9321, at *17 (D.D.C. May 29, 1997) (witnesses who testified) (Exemptions 7(C) and 7(F)), appeal voluntarily dismissed, No. 97-5122 (D.C. Cir. July 14, 1997); Myers v. United States Dep't of Justice, No. 85-1746, slip op. at 6 (D.D.C. Sept. 22, 1986) (law enforcement personnel who testified). But see Beck, No. 88-3433, slip op. at 2-3 (D.D.C. July 24, 1991) (exemption not necessarily waived when information revealed at public trial); Prows v. United States Dep't of Justice, No. 87-1657, slip op. at 6 (D.D.C. Apr. 13, 1989) (similar to protection under Exemption 7(C), DEA agents' identities protected even though they testified at trial), aff'd, No. 89-5185 (D.C. Cir. Feb. 26, 1990).

[11] LaRouche v. Webster, No. 75-6010, slip op. at 24 (S.D.N.Y. Oct. 23, 1984); see also Pfeffer v. Director, Bureau of Prisons, No. 89-899, slip op. at 4 (D.D.C. Apr. 18, 1990) (information about smuggling weapons into prisons could reasonably be expected to endanger physical safety of "some individual" and therefore was properly withheld under Exemption 7(F)).

quired for withholding under Exemption 7(F).[12] It is difficult to imagine any circumstance, though, in which the public's interest in disclosure could outweigh the personal safety of any individual. Moreover, as amended, Exemption 7(F) should be of greater utility to law enforcement agencies, given the lessened "could reasonably be expected" harm standard now in effect.[13] Agencies can reasonably infer from this modification Congress' approval to withhold information whenever there is a reasonable likelihood of its disclosure risking physical harm to someone.[14]

EXEMPTION 8

Exemption 8 of the FOIA protects matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."[1]

This exemption received little judicial attention during the first dozen years of the FOIA's operation. The only significant decision during that period was one which held that national securities exchanges and broker-dealers are not "financial institutions" within the meaning of the exemption.[2] With respect to stock exchanges, which have been held to constitute "financial institutions" under Exemption 8, that decision has not been followed.[3]

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[12] See FOIA Update, Spring 1984, at 5.

[13] See, e.g., Simpson v. United States Dep't of Justice, No. 87-2832, slip op. at 11 (D.D.C. Sept. 30, 1988) (need to protect identities of DEA agents held so "clear" that in camera review unnecessary); cf. Hoch v. CIA, No. 82-754, slip op. at 3 (D.D.C. Sept. 30, 1988) ("disclosures by the congressional committees did not purport to be official acknowledgements as to any of the information" sought), aff'd, 907 F.2d 1227 (D.C. Cir. 1990) (unpublished table decision).

[14] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act at 18 & n.34 (Dec. 1987); see also, e.g., Dickie v. Department of the Treasury, No. 86-649, slip op. at 13 (D.D.C. Mar. 31, 1987) (upholding application of Exemption 7(F) as amended based upon agency judgment of "very strong likelihood" of harm); accord Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (Oct. 4, 1993), reprinted in FOIA Update, Summer/Fall 1993, at 4-5 (establishing "foreseeable harm" standard governing use of FOIA exemptions); see also FOIA Update, Spring 1994, at 3.

[1] 5 U.S.C. § 552(b)(8) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

[2] M.A. Schapiro & Co. v. SEC, 339 F. Supp. 467, 470 (D.D.C. 1972).

[3] See Mermelstein v. SEC, 629 F. Supp. 672, 673-75 (D.D.C. 1986) (basing opinion in part upon legislative history of Government in the Sunshine Act, 5

(continued...)

Subsequent courts interpreting Exemption 8 have largely declined to restrict the "particularly broad, all-inclusive" scope of the exemption.[4] They have reasoned that "if Congress has intentionally and unambiguously crafted a particularly broad, all-inclusive definition, it is not our function, even in the FOIA context, to subvert that effort."[5] As one court recently stated: "Exemption 8 was intended by Congress--and has been interpreted by courts--to be very broadly construed."[6]

The Court of Appeals for the District of Columbia Circuit has gone so far as to state that in Exemption 8, Congress has provided "absolute protection regardless of the circumstances underlying the regulatory agency's receipt or preparation of examination, operating or condition reports."[7] Similarly, in a major Exemption 8 decision, the D.C. Circuit broadly construed the term "financial institutions" and held that it is not limited to "depository" institutions.[8] More recently, the District Court for the District of Colorado relied upon that D.C. Circuit decision when ruling that an "investment advisor company" is a "financial institution" under Exemption 8, observing that "investment advisors, as a matter of common practice, are fiduciaries of their clients who direct, and in reality make, important investment decisions."[9]

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[3](...continued)
U.S.C. § 552b (1994), which was passed subsequent to decision in M.A. Schapiro); see also Berliner, Zisser, Walter & Gallegos v. SEC, 962 F. Supp. 1348, 1351 n.5 (D. Colo. 1997) (rejecting argument that M.A. Schapiro "should inform" court's decision, as court in Mermelstein had noted that "subsequent passage of the Sunshine Act" rendered decision in M.A. Schapiro "no longer good law").

[4] Consumers Union of United States, Inc. v. Office of the Comptroller of the Currency, No. 86-1841, slip op. at 2 (D.D.C. Mar. 11, 1988); see also McCullough v. FDIC, 1 Gov't Disclosure Serv. (P-H) ¶ 80,194, at 80,494 (D.D.C. July 28, 1980).

[5] Consumers Union of United States, Inc. v. Heimann, 589 F.2d 531, 533 (D.C. Cir. 1978); see also Sharp v. FDIC, 2 Gov't Disclosure Serv. (P-H) ¶ 81,107, at 81,270 (D.D.C. Jan. 28, 1981); McCullough, 1 Gov't Disclosure Serv. (P-H) at 80,494.

[6] Pentagon Fed. Credit Union v. National Credit Union Admin., No. 95-1476, slip op. at 8 (E.D. Va. June 7, 1996).

[7] Gregory v. FDIC, 631 F.2d 896, 898 (D.C. Cir. 1980).

[8] Public Citizen v. Farm Credit Admin., 938 F.2d 290, 293-94 (D.C. Cir. 1991) (holding that National Consumer Cooperative Bank (NCCB) is "financial institution" for purposes of Exemption 8; exemption protects audit reports prepared by Farm Credit Administration (FCA) for submission to Congress regarding NCCB, although FCA does not regulate or supervise NCCB).

[9] Berliner, 962 F. Supp. at 1352 (relying on "legislative history of the Sunshine (continued...)

EXEMPTION 8

In examining the sparse legislative history of Exemption 8, courts have discerned two major purposes underlying it: (1) "to protect the security of financial institutions by withholding from the public reports that contain frank evaluations of a bank's stability," and (2) "to promote cooperation and communication between employees and examiners."[10] Accordingly, different types of documents have been held to fall within the broad confines of Exemption 8.

First and foremost, the authority of federal agencies to withhold bank examination reports prepared by federal bank examiners has not been questioned.[11] Further, matters that are "related to" such reports--that is, documents that "represent the foundation of the examination process, the findings of such an examination, or its follow-up"--have also been held exempt from disclosure.[12] Likewise, Exemption 8 has been employed to withhold portions of documents--such as internal memoranda and policy statements--that contain specific information about named financial institutions.[13]

Bank examination reports and related documents prepared by state regula-

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[9](...continued)
Act" in absence of "unambiguous definition of financial institutions provided in [the] FOIA's text or legislative history").

[10] Atkinson v. FDIC, 1 Gov't Disclosure Serv. (P-H) ¶ 80,034, at 80,102 (D.D.C. Feb. 13, 1980); see also Berliner, 962 F. Supp. at 1353 (delineating Exemption 8's "dual purposes" as "protecting the integrity of financial institutions and facilitating cooperation between [agencies] and the entities regulated by [them]"); Consumers Union, 589 F.2d at 534; Feinberg v. Hibernia Corp., No. 90-4245, 1993 WL 8620, at *4 (E.D. La. Jan. 6, 1993); Fagot v. FDIC, 584 F. Supp. 1168, 1173 (D.P.R. 1984), aff'd in pertinent part & rev'd in part, 760 F.2d 252 (1st Cir. 1985) (unpublished table decision).

[11] See Sharp, 2 Gov't Disclosure Serv. (P-H) at 81,270; Atkinson, 1 Gov't Disclosure Serv. (P-H) at 80,102.

[12] Atkinson, 1 Gov't Disclosure Serv. (P-H) at 80,102; see also Parsons v. Freedom of Info. Act Officer, Office of Consumer Affairs SEC, No. 96-4128, 1997 WL 461320, at *1 (6th Cir. Aug. 12, 1997) (summarily holding that "all communication[s] between" SEC and National Association of Securities Dealers (NASD), including "any SEC audits" of NASD, "were exempt from disclosure"); Biase v. Office of Thrift Supervision, No. 93-2521, slip op. at 12 (D.N.J. Dec. 16, 1993); Teichgraeber v. Board of Governors, Fed. Reserve Sys., No. 87-2505, 1989 WL 32183, at *1 (D. Kan. Mar. 20, 1989); Consumers Union, No. 86-1841, slip op. at 2-3 (D.D.C. Mar. 11, 1988); Folger v. Conover, No. 82-4, slip op. at 6-8 (E.D. Ky. Oct. 25, 1983); Sharp, 2 Gov't Disclosure Serv. (P-H) at 81,271.

[13] See Wachtel v. Office of Thrift Supervision, No. 3-90-833, slip op. at 19-20, 23, 26-28, 30, 33 (M.D. Tenn. Nov. 20, 1990) (protecting portions of documents that contain specific information about two named financial institutions--names of institutions, names of officers and agents, any references to their geographic locations, and specific information about their financial conditions).

tory agencies have been found protectible under Exemption 8 on more than one ground. The purposes of the exemption are plainly served by withholding such material because of the "interconnected" purposes and operations of federal and state banking authorities.[14] A state agency report transferred to a federal agency strictly for its confidential use, however, and thus still within the control of the state agency, was held as a threshold matter not even to be an "agency record" under the FOIA subject to disclosure.[15] In general, "all records, regardless of the source, of a bank's financial condition and operations and in the possession of a federal agency `responsible for the regulation or supervision of financial institutions,' are exempt."[16]

Indeed, even records pertaining to banks that are no longer in operation can be withheld under Exemption 8 in order to serve the policy of promoting "frank cooperation" between bank and agency officials.[17] The exemption protects even bank examination reports and related memoranda relating to insolvency proceedings.[18] Documents relating to cease-and-desist orders that issue after a bank examination as the result of a closed administrative hearing are also properly exempt.[19] Also, reports examining bank compliance with consumer laws and regulations have been held to "fall squarely within the exemption."[20]

Moreover, in keeping with the expansive construction of Exemption 8, courts in FOIA cases have generally not required agencies to segregate and disclose portions of documents unrelated to the financial state of the institution:

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[14] Atkinson, 1 Gov't Disclosure Serv. (P-H) at 80,102.

[15] McCullough, 1 Gov't Disclosure Serv. (P-H) at 80,495.

[16] Id. (quoting legislative history).

[17] Gregory, 631 F.2d at 899; accord Berliner, 962 F. Supp. at 1353 (upholding applicability of Exemption 8 to documents relating to company that had "been defunct for at least four years" and declining to adopt argument that passage of time abated "need for confidentiality").

[18] See, e.g., Tripati v. United States Dep't of Justice, No. 87-3301, 1990 U.S. Dist. LEXIS 6249, at *2-3 (D.D.C. May 18, 1990). But cf. In re Sunrise Sec. Litig., 109 B.R. 658, 664-67 (E.D. Pa. 1990) (holding that Federal Home Loan Bank of Atlanta could not rely upon regulation implementing Exemption 8 as independent evidentiary "bank examination privilege," and even under more general "official information privilege" there exists no absolute protection for internal working papers and other documents generated in government's examination of failed bank) (non-FOIA case).

[19] See, e.g., Atkinson, 1 Gov't Disclosure Serv. (P-H) at 80,103.

[20] Id.; cf. Consumers Union, 589 F.2d at 534-35 (concluding that Truth in Lending Act does not narrow Exemption 8's broad language); Consumers Union, No. 86-1841, slip op. at 2-3 (D.D.C. Mar. 11, 1988) (finding that reports fall within Exemption 8 "because they analyze and summarize information concerning consumer complaints").

EXEMPTION 8

"[A]n entire examination report, not just that related to the `condition of the bank' may be properly withheld" under FOIA case law.[21]

It should be noted, however, that a provision of the Federal Deposit Insurance Corporation Improvement Act of 1991 explicitly limits Exemption 8's applicability with respect to specific reports prepared pursuant to it.[22] That statute requires federal banking agency inspectors general to conduct a review and to make a written report whenever a deposit insurance fund incurs a material loss with respect to an insured depository institution (on or after July 1, 1993).[23] The statute further provides that, with the exception of information that would reveal the identity of any customer of the institution, the federal banking agency "shall disclose the report upon request under [the FOIA] without excising . . . any information about the insured depository institution under [Exemption 8]."[24]

Additionally, agencies should apply the governmentwide policy of government openness[25] and the "foreseeable harm" standard set forth in Attorney General Reno's FOIA Memorandum of October 4, 1993,[26] to information covered by Exemption 8.[27] Given the breadth of this exemption, and its purely institutional nature, the application of the "foreseeable harm" standard holds potential for increased agency disclosure as a matter of administrative discretion--particularly regarding factual portions of bank examination reports and related

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[21] Atkinson, 1 Gov't Disclosure Serv. (P-H) at 80,103. But see Fagot v. FDIC, No. 84-1523, slip op. at 5-6 (1st Cir. Mar. 27, 1985) (finding that portion of document which does not relate to bank report or examination cannot be withheld); see also FOIA Update, Summer/Fall 1993, at 11-12 ("OIP Guidance: The `Reasonable Segregation' Obligation").

[22] 12 U.S.C. § 1831o(k) (1994), as amended by Omnibus Consolidated Appropriations Act of 1997, 12 U.S.C.A. § 1831o (West Supp. 1997).

[23] Id. § 1831o(k)(1).

[24] Id. § 1831o(k)(4).

[25] See President's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993), reprinted in FOIA Update, Summer/Fall 1993, at 3.

[26] Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (Oct. 4, 1993), reprinted in FOIA Update, Summer/Fall 1993, at 4-5; see also FOIA Update, Spring 1997, at 1 (describing Attorney General's reiteration of importance of "foreseeable harm" standard to federal agencies in order to promote further discretionary disclosure in agency decisionmaking).

[27] See FOIA Update, Spring 1994, at 3 (noting applicability of "foreseeable harm" standard to Exemption 8); see also Gregory, 631 F.2d at 899 & n.4 (noting agency regulation providing for discretionary disclosure of Exemption 8 information).

documents.[28]

EXEMPTION 9

Exemption 9 of the FOIA covers "geological and geophysical information and data, including maps, concerning wells."[1] While this exemption is very rarely invoked or interpreted,[2] one court has held that it applies only to "well information of a technical or scientific nature."[3] Only two other decisions have addressed Exemption 9; however, both merely mentioned the exemption without discussing its scope or application.[4]

EXCLUSIONS

The Freedom of Information Reform Act of 1986 created an entirely new mechanism for protecting certain especially sensitive law enforcement matters under new subsection (c) of the FOIA.[1] These three special protection pro

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[28] See FOIA Update, Spring 1994, at 3; accord Pentagon Fed., No. 95-1476, slip op. at 9 (E.D. Va. June 7, 1996) (declining to extend Exemption 8 protection to "purely factual material"); Lee v. FDIC, 923 F. Supp. 451, 459 (S.D.N.Y. 1996) (same for information found to be "primarily factual"); cf. Schreiber v. Society for Sav. Bancorp, Inc., 11 F.3d 217, 220 (D.C. Cir. 1993) (in context of discovery, stating that "bank examination privilege protects only agency opinions and recommendations from disclosure; purely factual information falls outside the privilege") (non-FOIA case); In re Subpoena, 967 F.2d 630, 634 (D.C. Cir. 1992) ("The bank examination privilege, like the deliberative process privilege, shields from discovery only agency opinions or recommendations; it does not protect purely factual material.") (non-FOIA case).

[1] 5 U.S.C. § 552(b)(9) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

[2] See National Broad. Co. v. SBA, 836 F. Supp. 121, 124 n.2 (S.D.N.Y. 1993) (merely noting that document withheld under Exemption 4 "also contains geographic or geological information which is exempted from disclosure pursuant to FOIA Exemption 9").

[3] Black Hills Alliance v. United States Forest Serv., 603 F. Supp. 117, 122 (D.S.D. 1984) (withholding number, locations, and depths of proposed uranium exploration drill-holes).

[4] See Superior Oil Co. v. Federal Energy Regulatory Comm'n, 563 F.2d 191, 203-04 & n.20 (5th Cir. 1977) (non-FOIA case); Pennzoil Co. v. Federal Power Comm'n, 534 F.2d 627, 629-30 & n.2 (5th Cir. 1976) (non-FOIA case); cf. Ecee, Inc. v. Federal Energy Regulatory Comm'n, 645 F.2d 339, 348-49 (5th Cir. 1981) (holding that requirement that producers of natural gas submit confidential geological information was valid) (non-FOIA case).

[1] See Attorney General's Memorandum on the 1986 Amendments to the

(continued...)

visions, referred to as record "exclusions," expressly authorize federal law enforcement agencies, for especially sensitive records under certain specified circumstances, to "treat the records as not subject to the requirements of [the FOIA]."[2] It should be appreciated at the outset, however, that the unfamiliar procedures required to properly employ these special record exclusions are by no means straightforward and must be implemented with the utmost care.[3] Any agency considering employing an exclusion or having a question as to their implementation should first consult with the Office of Information and Privacy, at (202) 514-3642.[4]

Initially, it is crucial to recognize the somewhat subtle, but very significant, distinction between the result of employing a record exclusion and the concept that is colloquially known as "Glomarization."[5] That latter term refers to the situation in which an agency expressly refuses to confirm or deny the existence of records responsive to a request.[6] (A more detailed discussion of "Glomarization" is set forth under Exemption 1, In Camera Submissions, above, and also under Exemption 7(C), above.) The application of one of the three record exclusions, on the other hand, results in a response to the FOIA requester stating that no records responsive to his FOIA request exist.[7] While "Glomarization" remains adequate to provide necessary protection in certain situations, these special record exclusions should prove invaluable in addressing the exceptionally sensitive situations in which even "Glomarization" is inadequate to the task.

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[1](...continued)
Freedom of Information Act 18-30 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum].

[2] 5 U.S.C. § 552(c)(1), (c)(2), (c)(3) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997); see Tanks v. Huff, No. 95-568, slip op. at 12 (D.D.C. May 28, 1996), appeal dismissed, No. 96-5180 (D.C. Cir. Aug. 13, 1996).

[3] See Attorney General's 1986 Amendments Memorandum at 27 n.48.

[4] See id.

[5] See id. at 26 & n.47; see also Benavides v. DEA, 968 F.2d 1243, 1246-48 (D.C. Cir.) (initially confusing exclusion mechanism with "Glomarization"), modified, 976 F.2d 751, 753 (D.C. Cir. 1992).

[6] See, e.g., Gardels v. CIA, 689 F.2d 1100, 1103 (D.C. Cir. 1982); Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1976).

[7] See Attorney General's 1986 Amendments Memorandum at 18 (cited in Tanks, No. 95-568, slip op. at 12 (D.D.C. May 28, 1996)); see also Steinberg v. United States Dep't of Justice, No. 93-2409, 1997 WL 349997, at *1 (D.D.C. June 18, 1997) ("[T]he government need not even acknowledge the existence of excluded information.").

The (c)(1) Exclusion

The first of these novel provisions, known as the "(c)(1) exclusion," provides as follows:

> Whenever a request is made which involves access to records described in subsection (b)(7)(A) and (A) the investigation or proceeding involves a possible violation of criminal law; and (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.[8]

In most cases, the protection of Exemption 7(A) is sufficient to guard against any impairment of law enforcement investigations or proceedings through the FOIA. To avail itself of Exemption 7(A), however, an agency must routinely specify that it is doing so--first administratively and then, if sued, in court--even when it is invoking the exemption to withhold all responsive records in their entireties. Thus, in specific situations in which the very fact of an investigation's existence is yet unknown to the investigation's subject, invoking Exemption 7(A) in response to a FOIA request for pertinent records permits an investigation's subject to be "tipped off" to its existence. By the same token, any person (or entity) engaged in criminal activities could use a carefully worded FOIA request to try to determine whether he, she, or it is under federal investigation. An agency response that does not invoke Exemption 7(A) to withhold law enforcement files tells such a requester that his activities have thus far escaped detection.

The (c)(1) exclusion authorizes federal law enforcement agencies, under specified circumstances, to shield the very existence of records of ongoing investigations or proceedings by excluding them entirely from the FOIA's reach.[9] To qualify for such exclusion from the FOIA, the records in question must be those which would otherwise be withheld in their entireties under Exemption 7(A). Further, they must relate to an "investigation or proceeding [that] involves a possible violation of criminal law."[10] Hence, any records pertaining to a purely civil law enforcement matter cannot be excluded from the FOIA under this provision, although they may qualify for ordinary Exemption 7(A) withholding. However, the statutory requirement that there be only a "possible violation of criminal law," by its very terms, admits a wide range of investigatory files

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[8] 5 U.S.C. § 552(c)(1) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

[9] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 18-22 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum].

[10] 5 U.S.C. § 552(c)(1)(A).

maintained by more than just criminal law enforcement agencies.[11]

Next, the statute imposes two closely related requirements which go to the very heart of the particular harm addressed through this record exclusion. An agency determining whether it can employ (c)(1) protection must consider whether it has "reason to believe" that the investigation's subject is not aware of its pendency and that, most fundamentally, the agency's disclosure of the very existence of the records in question "could reasonably be expected to interfere with enforcement proceedings."[12]

Obviously, where all investigatory subjects are already aware of an investigation's pendency, the "tip off" harm sought to be prevented through this record exclusion is not of concern. Accordingly, the language of this exclusion expressly obliges agencies contemplating its use to consider the level of awareness already possessed by the investigative subjects involved. It is appropriate that agencies do so, as the statutory language provides, according to a good-faith, "reason to believe" standard--which very much comports with the "could reasonably be expected to" standard utilized both elsewhere in this exclusion and in the amended language of Exemption 7(A).[13]

This "reason to believe" standard for considering a subject's present awareness should afford agencies all necessary latitude in making such determinations. As the exclusion is phrased, this requirement is satisfied so long as an agency determines that it affirmatively possesses "reason to believe" that such awareness does not in fact exist. While it is always possible that an agency might possess somewhat conflicting or even contradictory indications on such a point, unless an agency can resolve that a subject is aware of an investigation, it should not risk impairing the investigation through a telling FOIA disclosure.[14] Moreover, agencies are not obligated to accept any bald assertions by investigative subjects that they "know" of ongoing investigations against them; such assertions might well constitute no more than sheer speculation. Because such a ploy, if accepted, could defeat the exclusion's clear statutory purpose, agencies should rely upon their own objective indicia of subject awareness and consequent harm.[15]

In the great majority of cases, invoking Exemption 7(A) will protect the

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[11] See Attorney General's 1986 Amendments Memorandum at 20 & n.37 (files of agencies that are not primarily engaged in criminal law enforcement activities may be eligible for protection if they contain information about potential criminal violations that are pursued with the possibility of referral to Department of Justice for further prosecution).

[12] 5 U.S.C. § 552(c)(1)(B).

[13] See Attorney General's 1986 Amendments Memorandum at 21.

[14] See id.

[15] See id. at n.38.

interests of law enforcement agencies in responding to FOIA requests for active law enforcement files. The (c)(1) exclusion should be employed only in the exceptional case in which an agency reaches the judgment that, given its belief of the subject's unawareness of the investigation, the mere invocation of Exemption 7(A) could reasonably be expected to cause harm--a judgment that should be reached distinctly and thoughtfully.[16]

Finally, the clear language of this exclusion specifically restricts its applicability to "during only such time" as the above required circumstances continue to exist. This limitation comports with the extraordinary nature of the protection afforded by the exclusion, as well as with the basic temporal nature of Exemption 7(A) underlying it. It means, of course, that an agency that has employed the exclusion in a particular case is obligated to cease doing so once the circumstances warranting it cease to exist.

Once a law enforcement matter reaches a stage at which all subjects are aware of its pendency, or at which the agency otherwise determines that the public disclosure of that pendency no longer could lead to harm, the exclusion should be regarded as no longer applicable. If the FOIA request which triggered the agency's use of the exclusion remains pending either administratively or in court at such time, the excluded records should be identified as responsive to that request and processed in the ordinary manner.[17] However, an agency is under no legal obligation to spontaneously reopen a closed FOIA request, even though records were excluded during its entire pendency: By operation of law, the records simply were not subject to the FOIA during the pendency of the request.[18]

Where all of these requirements are met, and an agency reaches the judgment that it is necessary and appropriate that the (c)(1) exclusion be employed in connection with a request, the records in question will be treated, as far as the FOIA requester is concerned, as if they did not exist.[19] Where it is the case that the excluded records are just part of the totality of records responsive to a FOIA request, the request will be handled as a seemingly routine one, with the other responsive records processed as if they were the only responsive records in existence. Where the only records responsive to a request fall within the exclusion, the requester will lawfully be advised that no records responsive to his

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[16] See id. at 21; accord Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (Oct. 4, 1993), reprinted in FOIA Update, Summer/Fall 1993, at 4-5 (establishing "foreseeable harm" standard, based upon all "reasonably expected consequences" involved); see also FOIA Update, Spring 1997, at 1 (reiterating importance of "foreseeable harm" standard).

[17] See Attorney General's 1986 Amendments Memorandum at 22.

[18] See id. at 22 n.39.

[19] See id. at 22.

FOIA request exist.[20]

In order to maintain the integrity of an exclusion, each agency that employs it must ensure that its FOIA responses are consistent throughout. Therefore, all agencies that could possibly employ at least one of the three record exclusions should ensure that their FOIA communications are consistently phrased so that a requester cannot ever discern the existence of any excluded records, or of any matter underlying them, through the agency's response to his FOIA request.

The (c)(2) Exclusion

The second exclusion created by the FOIA Reform Act applies to a narrower situation, involving the threatened identification of confidential informants in criminal proceedings.[21] The "(c)(2) exclusion" provides as follows:

> Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of [the FOIA] unless the informant's status as an informant has been officially confirmed.[22]

This exclusion contemplates the situation in which a sophisticated requester could try to identify an informant by forcing a law enforcement agency into a position in which it otherwise would have no lawful choice but to tellingly invoke Exemption 7(D) in response to a request which encompasses informant records maintained on a named person.[23] In the ordinary situation, Exemption 7(D), as amended, should adequately allow a law enforcement agency to withhold all items of information necessary to prevent the identification of any of its confidential sources.[24]

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[20] See id.

[21] See Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 22-24 (Dec. 1987) [hereinafter Attorney General's 1986 Amendments Memorandum]; see also Tanks v. Huff, No. 95-568, slip op. at 12 (D.D.C. May 28, 1996), appeal dismissed, No. 96-5180 (D.C. Cir. Aug. 13, 1996).

[22] 5 U.S.C. § 552(c)(2) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

[23] See Attorney General's 1986 Amendments Memorandum at 23.

[24] See, e.g., Keys v. United States Dep't of Justice, 830 F.2d 337, 345-46 (D.C. Cir. 1987); see also United States Dep't of Justice v. Landano, 508 U.S. 165, 179-81 (1993) (although "the Government is not entitled to a presumption that a source is confidential within the meaning of Exemption 7(D) whenever the source provides information to the FBI in the course of a criminal investigation," it

(continued...)

[24](...continued)
should "often" be able to identify circumstances supporting an inference of confidentiality); FOIA Update, Summer/Fall 1993, at 10.